No 358

IN THE

Supreme Court of the United States

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October Term, 1943.

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, and LENOX COAL COMPANY,

Petitioners,

v.

MAURICE P. ANGLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Cosgrove-Meehan Coal Corporation, Cosgrove & Company, Inc., Cosgrove-Meehan Coal Company of Pennsylvania, and Lenox Coal Company, respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review the judgment of that Court entered May 24, 1943, reversing a judgment of the United States District Court for the District of Delaware.

Statement.

Maurice P. Angland, respondent herein, in July of 1935 became a member of a committee of bondholders of Cosgrove-Meehan Coal Corporation, petitioner herein,

formed for the purpose of bringing about a reorganization of that corporation and its subsidiary companies, Cosgrove & Company, Inc., Cosgrove-Meehan Coal Company of Pennsylvania and Lenox Coal Company (No. 138, p. 48).[1] At the time of the formation of said committee, Cosgrove-Meehan Coal Company of Illinois, another subsidiary, was in bankruptcy in proceedings in the United States District Court for the Southern District of Illinois (No. 107, Plan of Reorganization, p. 3).

In anticipation of the reorganization of the parent and its subsidiaries, the bondholders' committee determined to salvage the properties of the Illinois subsidiary (No. 138, p. 55), and respondent as a member of the committee entered into an agreement with the trustee in bankruptcy for the Illinois subsidiary under the terms of which $2500 in cash, which was advanced by Cosgrove & Company, Inc., was paid to the trustee in exchange for a conveyance of the properties of the bankrupt to respondent, who in turn was to assign them to a new corporation to be formed for the purpose of holding title thereto, subject to the payment of certain preferred obligations against the bankrupt (No. 138, p. 52 et seq.). Respondent proceeded to liquidate a portion of the properties and to apply the proceeds to the payment of the preferred obligations of the bankrupt (No. 138, p.

[1] The Circuit Court of Appeals heard the appeal from the District Court upon the original papers in accordance with the provisions of Section 250 of Chapter X of the Bankruptcy Act, as amended (11 U. S. C. A. § 650, page 461), and the original papers were certified by the Circuit Court of Appeals to this Court in lieu of a certified transcript of the record as required by Rule 38, Paragraph 1. In this petition all references are to the docket numbers assigned by the Clerk of the District Court to the various papers filed in the proceeding, which numbers appear on said papers.

58), and subsequently, about the middle of the year 1937, conveyed the properties to Panama Mining Company which became a subsidiary of Cosgrove & Company, Inc. (No. 107, Plan of Reorganization, p. 5).

Petitions for reorganization of petitioners under Section 77B of the Bankruptcy Act, as amended, were filed in the United States District Court for the District of Delaware on June 22, 1937 (Nos. 1, 2, 3 and 4). Thereafter, by order dated September 7, 1937, the Court consolidated the petitions into a single cause, continued the respective debtors in possession of their properties and businesses, fixed November 1, 1937, "as a reasonable time in which the claims and interests of creditors and stockholders of the respective debtors [should] be filed or evidenced," and ordered that "no such claim or interest [might] participate in any plan of reorganization of the respective debtors except on order for cause shown unless filed or evidenced on or prior to said date in the manner herein provided" (No. 41). Proof of publication and mailing of notice as required by the order was filed in the proceedings on October 9, 1937 (No. 48).

A plan of reorganization of petitioners was approved by the District Court on April 17, 1942 (No. 108); and the plan, having been duly noticed for hearing in accordance with said order and accepted by the requisite amount and number of security holders, was confirmed and petitioners were directed to consummate the plan by order dated June 6, 1942 (No. 117). Paragraph (3) of the order provided:

> "The Plan of Reorganization of said Debtors shall be effective as of January 1, 1942, and it and its provisions and the provisions of this order of confirmation shall be binding upon the Debtors and each of them, *and upon all creditors and stockholders thereof,*

whether or not such creditors and stockholders are affected by said Plan of Reorganization, as amended, or have accepted it, or have filed proofs of their claims or interests herein, and whether or not their claims or interests have been scheduled or allowed, or allowable." (Emphasis supplied.)[2]

Paragraph (7) of the order provided:

"Jurisdiction is hereby reserved to this Court:

"(a) To supervise and control the manner in which the Plan of Reorganization, as amended, shall be put into effect and carried out, and all instruments, indentures, or securities necessary and appropriate to carry out the said Plan of Reorganization, as amended.

"(b) Over the claim filed herein by L. F. Wagner, et al, against the Debtors, but not to date allowed.

"(c) To allow reasonable compensation for the services rendered and reimbursement for actual and necessary costs and expenses incurred by parties in interest, depositaries, the trustees under the present First Mortgage Indenture of Cosgrove-Meehan Coal Corporation, committees, other representatives of creditors or stockholders, or other persons, and the officers, attorneys or agents for any of the foregoing, and of or for the Debtors, or any of them, in or in connection with this proceeding, or in connection with the Plan of Reorganization, as amended, and incident to this proceeding.

"(d) Generally, to determine any and all matters pertinent to this proceeding or to said Plan of Reor-

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[2] The provisions of this paragraph of the order are copied substantially *in haec verba* from Par. (1) of Sec. 224 of Chapter X of the Bankruptcy Act, as amended (11 U. S. C. A. § 624). Chapter X was made applicable to the proceeding generally by order of the District Court dated September 15, 1942 (No. 150).

ganization, as amended, *and not determined heretofore or by this order.*" (Emphasis supplied.)

Paragraph (8) of the order provided that all applications for compensation for services rendered and reimbursement for actual and necessary costs and expenses incurred by parties in interest should be filed on or before June 17, 1942, and fixed June 27, 1942, as the time for hearing said applications.

No application for the alteration or amendment of the plan under the provisions of Section 222 (11 U. S. C. A. § 622) of the Bankruptcy Act, as amended, was made within the time for appeal from said order; no appeal was taken from said order; and no application has ever been made in the District Court for a reopening of said proceedings.

In response to said order, respondent filed two claims for compensation, the one for general services performed as a member and secretary of the bondholders' committee (No. 131) and the other for individual services rendered in connection with the salvage of the Illinois properties (No. 130). The District Court, after due hearing, disallowed both of the claims on the ground that respondent, having dealt in the securities of Cosgrove-Meehan Coal Corporation, was disqualified from receiving compensation under the provisions of Section 249 of Chapter X of the Bankruptcy Act, as amended (11 U. S. C. A. § 649). (No. 151).[3] Respondent then filed his petition for leave to appeal to the United States Circuit Court of Appeals for the Third Circuit, which was granted by said Court. The Court by its judgment dated May 24, 1943,[3] found that the District Court did not err in disqualifying respondent from compensation for services rendered in connection with the reor-

[3] Copy included in Appendix hereto.

ganization proceeding, but opined that respondent's claim for salvage work was a creditor's claim, and concluded:

> "To the extent that the order of the District Court denied the applicant's claim for compensation for his services in salvaging the defendants' property prior to bankruptcy on the ground that the claim was barred by Section 249 as one arising out of a reorganization proceeding, the order is reversed and the cause is remanded for the purpose of permitting the claimant to apply to the District Court for a reopening of the proceeding in order that that claim may be considered and passed upon as a claim against the debtors' estate in bankruptcy."

Thereupon petitioners filed a petition for rehearing and by order dated June 17, 1943, the Court denied the petition, but amended its judgment, inter alia, as follows:

> "Between the words 'proceeding' and 'in' in the third line from the end of the opinion insert the following: ', if in the opinion of the District Court such action is warranted,' ".

Petitioners then requested leave to file a second petition for rehearing, which was denied by order of the Court dated June 29, 1943.

Basis for Jurisdiction.

It is contended that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Third Circuit under the provisions of Section 24 (c) of the Bankruptcy Act, as amended (11 U. S. C. A. § 47 (c)), and Section 240 (a) of the Judicial Code (28 U. S. C. A. § 346 (a)).

The Question Presented.

The Circuit Court of Appeals erred in holding that the District Court had jurisdiction to reopen the reorganization proceedings for the purpose of determining a creditor's claim after the confirmation of a plan of reorganization which had become final and was binding upon all creditors.

Reasons for Allowance of Writ.

1. The decision of the question here involved is of importance not only from the standpoint of the petitioners in the present case, but from the standpoint of reorganization administration in general. If creditors are to be permitted to come in after a plan of reorganization has become final and at any time prior to final decree in the District Court, the rights of the parties affected by the plan of reorganization could be changed from time to time even though the final decree might be delayed indefinitely pending the decision of any incidental matters over which the Court has retained jurisdiction. If respondent's claim may be reconsidered, then other creditors who failed to file their claims prior to the falling of the bar order and the confirmation of the plan may likewise apply to the Court for a reopening of the proceedings and thereby impose additional burdens and expense upon the reorganized company, the petitioners, and other parties in interest.

2. The interests of justice and expedience demand that the rights of petitioners should be finally adjudicated by the Circuit Court of Appeals. Under the judgment of the Circuit Court of Appeals as it now stands, an application to reopen will be made to the District Court; and regardless of its ruling, a further appeal will be necessary to the Circuit Court of Appeals, thereby delaying the entry of

the final decree and hampering the welfare and progress of the reorganized company.

3. The judgment of the Circuit Court of Appeals is in direct conflict with the provisions of the Bankruptcy Act, as amended.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals be reversed, and that petitioners be granted such other and further relief as may seem proper.

COSGROVE-MEEHAN COAL CORPORATION,
COSGROVE & COMPANY, INC.,
COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, AND
LENOX COAL COMPANY,

By: WM. H. FOULK,
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4028 duPont Building,
Wilmington, Delaware.

IN THE

UNITED STATES SUPREME COURT.

October Term, 1943.

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, AND LENOX COAL COMPANY,

Petitioners,

v.

MAURICE P. ANGLAND,

Respondent.

BRIEF IN SUPPORT OF PETITION.

The facts set forth in the foregoing petition disclose that respondent filed a claim for allowance to him of compensation for individual services performed while he was a member of a bondholders' committee prior to the filing of the petitions for reorganization as an administration expense, and that he filed no claim as a creditor. The District Court found that respondent had traded in securities of the petitioners in violation of the provisions of Section 249 of the Bankruptcy Act, as amended (11 U. S. C. A. § 649), and was consequently disqualified from receiving compensation.

The only question before the Circuit Court of Appeals was whether or not the District Court had erred in disallowing compensation to respondent as an administration expense. Upon this question it agreed with the District Court, but gratuitously determined that respondent had a creditor claim rather than an administration claim which

should receive the further consideration of the District Court, in startling disregard of the facts disclosed in the record:

(1) That the bar order on the filing of creditors' claims had fallen on November 1, 1937;

(2) That the District Court had ordered complete distribution of the estate in its decree confirming the plan of reorganization dated June 6, 1942;

(3) That the District Court in paragraph (3) of said order had again specifically barred all creditors' claims not theretofore filed as required by Section 224 (1) of Chapter X (11 U. S. C. A. § 624 (1));

(4) That the District Court had completely divested itself of all jurisdiction other than that specifically reserved by that order;

(5) That no application was pending before the District Court for alteration or modification of the plan of reorganization;

(6) That the time for appeal from the order confirming the plan had expired; and

(7) The plan, therefore, had become final.

The Circuit Court of Appeals ignored the fact that any reopening of said proceedings so as to permit the allowance of respondent's claim would materially and adversely affect the rights of other creditors since it would necessarily result in a dilution of the assets to which they were entitled under the plan of reorganization.

The Circuit Court of Appeals failed to realize that once a plan of reorganization completely dispositive of the assets and property in the custody of the court available for the creditors and other parties in interest has become

final, the curtain has fallen, and the subsequent disposition of incidental matters over which the District Court has retained jurisdiction has no more significance than curtain bows.

The Circuit Court of Appeals apparently believed that the amendment of its judgment so as to provide some discretion to the District Court as to whether or not the proceeding should now be reopened would cure the error therein. However, it is clear that the mandate of the Circuit Court must be interpreted as informing the District Court that it still has jurisdiction to open the proceeding and let in the respondent as a creditor claimant if it considers that for cause shown the respondent has not been guilty of laches. As hereinbefore pointed out, however, the matter goes to the jurisdiction of the District Court; and we firmly believe that the record shows that jurisdiction is completely lacking. Consequently, the effect of the judgment of the Circuit Court of Appeals is to harass and embarrass the petitioners and the reorganized company by a further needless continuance of the proceeding and a delay in the entry of the final decree.

It is respectfully submitted that in view of the importance of the question involved and the obvious conflict between the decision of the court below and the provisions of the Bankruptcy Act, as amended, the writ of certiorari should be granted.

Respectfully submitted,

Wm. H. Foulk,
Attorney for Petitioners,
4028 duPont Building,
Wilmington, Delaware.

APPENDIX.

Opinion of the District Court.

BIGGS, *Circuit Judge.*

I am somewhat handicapped in passing upon the pending applications by reason of the fact that my connection with this case is of comparatively recent date. I have endeavored to do substantial justice to the parties and have examined the complete record carefully.

The following allowances by way of compensation and for reimbursement of expenses will be made in this case.

Applicant.	Compensation Allowed.	Expenses Allowed.
William H. Foulk Attorney for the Debtors	$15,000.00	$626.91
Estate of Ernest Stewart Attorney for the Debtors	2,000.00	—
Robert M. Weidenhammer President of the Debtors	00.00	—
Davies, Silverstone & Co. Accountants for the Debtors	1,045.00	—
The Chase National Bank of the City of New York and John A. Burns, Indenture Trustees	2,500	6.33
Milbank, Tweed & Hope Attorneys for Indenture Trustees	2,000.00	175.58
Southerland, Berl & Potter Attorneys for Indenture Trustees	1,000.00	27.00

Applicant.	Compensation Allowed.	Expenses Allowed.
Richards, Layton & Finger Attorneys for Bondholders Committee	500.00	—
Laurence R. Lunden Bondholders Committee's Expenses	—	00.00
Maurice P. Angland, Secretary, on behalf of Bondholders Committee	00.00	—
Maurice P. Angland, Individually	00.00	—
E. Joseph Seifert As a member of Bondholders Committee	100.00	—

I shall discuss briefly the application of Robert M. Weidenhammer, the president of the debtors, and those of Maurice P. Angland, individually and as secretary of the Bondholders Committee. Weidenhammer testified that he had loaned Angland twenty bonds of a market value of about $8,000. in 1934 with the understanding that this amount would be paid back in a year. Angland did not return the loan and according to Weidenhammer's statements he became a kind of involuntary partner in Angland and Company, then a partnership, in order to try to get his money back. On January 2, 1935 this informal arrangement was superseded by a formal partnership agreement and at the beginning of 1936 a corporation was formed, styled Angland and Company, Inc. Angland and Weidenhammer each owned half of the stock of this Corporation. Weidenhammer and Angland were both members of a Bondholders

Committee which formally came into being about the middle of the year 1935. Shortly after this and some time before the petitions for reorganization were filed Weidenhammer and other members of the Committee became the debtors' board of directors and Weidenhammer became a member of the executive committee. Angland became a director in 1936. Petitions for reorganization pursuant to the provisions of Section 77B were filed in this court on June 22, 1937, and a month later Weidenhammer became the president of the debtors. No trustees were appointed by the court and the debtors were continued in possession. These facts clearly demonstrate that both Angland and Weidenhammer had a fiduciary relationship to the debtors and that this relationship has continued in Weidenhammer's case up to the present time. Angland's fiduciary relationship was terminated when the committee on which he served was dissolved.

Section 249 of the Bankruptcy Act provides in part,

> ". . . No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold . . . claims or stock, or by whom or for whose account . . . . claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred." Section 276 (c) (2) provides that "if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable."

By the order of this court of June 6, 1942, approving the plan of reorganization, certain provisions of the amend-

atory act were made applicable to the present proceedings. I am of the opinion that the provisions of Section 249 should be deemed to be applicable to the present applications for compensation.[1] Indeed, at the hearings in respect to compensation and in their briefs the parties most concerned have assumed that the provisions of Section 249 were in effect. It is just to apply them.

The record shows that the Angland brokerage house dealt in the bonds of Cosgrove-Meehan Coal Corporation for its own account while the fiduciary relationships which I have described existed. While Angland testified that he had given instructions that his trader was not to buy the securities of the debtors for the account of either the partnership or the corporation, the record demonstrates that these instructions were not obeyed. Weidenhammer and Angland are debarred from the compensation which they now seek by virtue of the provisions of Section 249. See the decision of the Court of Appeals of this Circuit in In re Reynolds Investing Company, Inc., F. (2nd).

Another and serious question is presented by the compensation which has already been paid to Weidenhammer pursuant to orders entered by Judge Nields in this court on September 7, 1937 and on December 30, 1937, allowing him compensation as president of the debtors, first in the sum of $100 a month and later in the sum of $200 a month. Prior to the passage of Chapter X, applicants for compensation frequently were barred from receiving it if they came into court under circumstances which indicated they had acted for private gain in an abuse of a fiduciary relationship which existed between them and the debtor or its security holders. This consists of nothing more than the

[1] An order will be entered to such effect.

application of the ancient equitable doctrine of "unclean hands", that he who seeks compensation as a result of a fiduciary relationship must render loyal and disinterested service. See In re Mountain States Power Co., 118 F. (2nd) 405, 407-408, and the authorities therein cited. Weidenhammer served as president of the debtors for more than four years. That he rendered loyal and effective service seems to be attested by the Securities and Exchange Commission and by the counsel for the debtors. I am convinced that he served the debtors at a not inconsiderable sacrifice in personal income. He has been continued as president as a result of the consummation of the plan of reorganization approved by the court. None the less his connection with the Angland brokerage house clearly appears. Should he be compelled to return the compensation which he has already received?

Apparently Weidenhammer did not pay close attention to the transactions of the brokerage concern. He should have done so, of course. Though his interest therein was substantial he seems to have had very little to do directly with the transactions of the concern and he appears to have had little, if any, personal knowledge of them. He received small, if any, profit therefrom. The house soon entered receivership. In view of all of the circumstances I conclude it would be unjust to compel Weidenhammer to return the $11,200 which he has received as a result of more than four years' work as the president of the debtors. To compel him to do so would require setting aside the orders made by Judge Nields and treating them as improvidently entered in an abuse of the very wide discretion which must be exercised by a district judge in administering estates in reorganization. I shall not take this step. It must be un-

derstood, however, that my decision in this regard is based upon the facts of this particular case and must not be regarded as a precedent.

* * * * * *

(Omitted portion deals with claim of one Laurence R. Lunden).

As to the application of the Bondholders' Committee for allowance, so far as Angland is concerned, compensation to him as a member of the Committee will be barred by reason of the provisions of Section 249. As to Seifert, I conclude that he is entitled to some small compensation as a member of the Committee. Accordingly I will allow him the sum of $100.00. As to the Committee's counsel, the record shows that their services were of aid to the administration of the debtors' estates. They made one appearance in court and successfully opposed an application to remove the cause to the Western District of Pennsylvania. They performed other services which were of some value to the reorganization. I shall allow them compensation in the sum of $500.00.

JOHN BIGGS, JR. (S)
U. S. Circuit Judge.

Dated: September 15, 1942.

Opinion of the Circuit Court of Appeals.

(Filed May 24, 1943.)

Before MARIS, JONES and GOODRICH, *Circuit Judges.*

JONES, *Circuit Judge.*

In a proceeding under Section 77B of the Bankruptcy Act for the reorganization of Cosgrove-Meehan Coal Corporation, debtor, (subsequently expressly made subject to the provisions of Chapter X by court order), the District Court denied two separate applications of one Maurice P. Angland for allowances of compensation for services said to have been beneficial to the reorganization. On Angland's petition we granted him leave to appeal from the order below.

The one application covers services performed by the claimant as a member of a committee of the debtor's bondholders which committee functioned both prior to and during the reorganization proceeding. The other application is for services performed prior to the reorganization proceeding, while the claimant was acting as the agent or trustee of the debtor corporation in salvaging properties of an Illinois corporation, then in bankruptcy, which was owned by the debtor. The interest in the Illinois corporation constituted approximately eighty per cent of the debtor's total assets. It is the claimant's theory, and testimony was offered to prove, that the salvaging of the properties of the Illinois corporation was a prerequisite to and in anticipation of the reorganization of the debtor.

While serving in the capacities above indicated, Angland was also a member of an investment firm (later incorporated) which at times hereinafter to be designated dealt in bonds of the debtor corporation. Also certain of like

bonds which he had pledged as security for a liability upon a note were sold by the pledgee during the reorganization proceeding without application to the court (having charge of the reorganization) for its approval. It is only fair to mention that, at the time of this sale, the Chandler Act had not been enacted. However, the reorganization proceeding was later subjected to the provisions of Chapter X.

The questions presented are (1) whether the dealings by Angland or his investment firm in bonds of the debtor corporation brought him within the disqualifications imposed by Section 249 of Chapter X of the Bankruptcy Act with respect to his claims for allowances in the reorganization proceeding, and (2) whether he is entitled in that proceeding to an allowance of compensation for services performed by him in salvaging property of the debtor prior to the bankruptcy, which ultimately constituted the major part of the debtor's assets dealt with in the reorganization proceeding.

Angland became a member of the committee of the debtor's bondholders about the middle of 1935. He was then the owner of a one-third interest in about one hundred of the debtor's bonds, his interest therein having been pledged by him to secure a loan upon which he was personally liable to the extent of one-third of the principal thereof. He also owned a fifty per cent interest in and was the active manager of Angland & Co., a partnership, which was engaged in the securities business. In January 1936 this partnership was succeeded by a corporation (Angland & Company, Inc.), wherein Angland owned a fifty per cent stock interest and whereof he was likewise the active manager. Between June 1935 and July 1936 the firm of Angland & Co. or its successor corporation executed orders for the sale of

one hundred twenty of the debtor's bonds for customers and a few of such bonds from the firm's inventory. The debtor's petition for reorganization under Section 77B was filed June 22, 1937.

In October 1937 Angland & Company, Inc., went into receivership, and in January 1938 the bank loan for which Angland was personally obligated was called and his one-third interest in the one hundred bonds of the debtor, pledged as security for the loan, was sold by the pledgee. The sale appears to have been necessary. At that time, a drop of an additional point in the market value of the bonds would have rendered the collateral insufficient to liquidate the loan. Angland was then a member of the bondholders' committee, as he had continued to be since the middle of 1935.

In May 1936, more than a year prior to the filing of the petition for reorganization, the debtor appropriated $2,500 to be used by the nominee of one Farley, Angland's attorney, to acquire in the debtor's behalf title to the properties of its Illinois subsidiary in bankruptcy, freed from numerous encumbrances to which they were then subject. Farley nominated Angland for the work. Between May 1936 and March 1937 Angland performed extensive services, more particularly specified in his claim for compensation, which produced for the debtor corporation properties of substantial value.

The District Court denied both of Angland's claims on the ground that he was disqualified as a claimant for compensation in the reorganization proceeding because of Section 249 of Chapter X. So far as the claim for compensation as a member of the bondholders' committee is concerned, we think the ruling of the court below was

unquestionably correct. While it is true, as Angland urges, that the last of the voluntary transactions by him or his firm in bonds of the debtor corporation occurred almost a year prior to the institution of the reorganization proceeding, he was none the less a member of the bondholders' committee when those transactions took place and it is in his capacity as a member of the same committee that he now claims compensation in the reorganization proceeding. He makes no attempt to sever his services as a committee member prior to the reorganization proceeding from the services performed by him in like capacity after the institution of that proceeding. Nor can we perceive how he could make any such severance. The character of his fiduciary relation as a committee member was a continuing status of identic quality throughout, regardless of when the reorganization proceeding was instituted. Angland's claim for compensation as a committee member therefore falls within the disqualifying specifications of Section 249. Cf. In re Reynolds Investing Co., Inc., 130 F. 2d 60 (C. C. A. 3).

Moreover, the sale of Angland's interest in the one hundred bonds of the debtor corporation by the pledgee thereof in January 1938 was alone sufficient to disqualify him as a committee-member claimant for compensation in the reorganization proceeding. It is not only voluntary purchases or sales of a debtor's securities to which Section 249 applies. It denies compensation as well to any person acting in a reorganization proceeding in a representative or fiduciary capacity *for whose account* claims against or securities of the debtor have been purchased or sold without the prior consent or subsequent approval of the judge in the reorganization proceeding. The bona fides of such purchases or sales is not material under Section 249. See In re

Reynolds Investing Company, *supra,* at p. 62. True enough, Section 249 was not in force when Angland's pledgee sold the pledged bonds in January of 1938, but the proceeding was later made subject to Chapter X by express order of the court and the matter has since been treated with by all parties on the basis that Chapter X is applicable to the proceeding. When Chapter X became pertinent, Angland could then have applied for the court's approval of his own or his pledgee's antecedent sales of bonds of the debtor.

If the claim for compensation for services performed by Angland as the debtor's agent or trustee for the salvaging of its property prior to bankruptcy may competently be considered as a charge against the reorganization proceeding, the provisions of Section 249 are likewise fatal to its allowance. But, in the view we take, that claim is in no sense a reorganization claim. Cf. In re Ulen & Co., 130 F. 2d 303, 305 (C. C. A. 2). The service was undertaken and completed, as it was intended so to be, prior to the institution of the reorganization proceeding. It was a claim against the debtor's property like that of any other creditor except that it carried with it an equity entitling it to consideration for priority of payment out of the fund which the services claimed for had produced. But such claims, like the claims of all other creditors, are matter for appropriate treatment in the plan of reorganization where claims against the debtor are recognized and dealt with according to their grade.

While the time for proving claims against the debtor's estate has passed, we think that the applicant's showing as to the character, extent and value of his service in salvaging the debtor's property prior to bankruptcy is such as to entitle him to apply for a reopening of the proceeding in order

that the merit of his claim may be considered and passed upon. Cf. Mohonk Realty Corporation v. Wise Shoe Stores, Inc., 111 F. 2d 287, 288-289 (C.C.A. 2) cert. den. 311 U. S. 654. *In so saying, we intend neither implication nor suggestion with respect to the merit or timeliness of such an application or the claim to which it refers, which remain matters for the independent judgment of the District Court according as the facts and the law may warrant.** Not being a claim for services in connection with the reorganization proceeding, it is not subject to the conclusive barrier raised by Section 249 of Chapter X of the Bankruptcy Act. However, it is none the less subject to scrutiny on the basis of the equitable principle that one who acts in a fiduciary capacity may not deal with the subject matter of his trust so as to bring his own personal interest into conflict with his duty to his beneficiaries. Michoud et al. v. Girod et al., 45 U. S. (4 How.) 502, 555-557; see also In re Mountain States Power Company, 118 F. 2d 405, 407 (C.C.A. 3), and cases there cited. Whether Angland's sale of bonds of the debtor corporation while he was acting as the debtor's agent or trustee for the salvaging of its property prior to its bankruptcy created, either actually or impliedly, a conflict between his personal interest and his fiduciary obligations is for the trial court to determine preliminarily. Short of the conclusive inhibition of Section 249, it is to such a determination that the equitable principle to which we have referred may become germane.

To the extent that the order of the District Court denied the applicant's claim for compensation for his services in salvaging the debtor's property prior to bankruptcy on the

*Italicized portions are amendments supplied by order of the Court dated June 17, 1943.

round that the claim was barred by Section 249 as one rising out of a reorganization proceeding, the order is eversed and the cause is remanded for the purpose of ermitting the claimant to apply to the District Court for reopening of the proceeding, *if in the opinion of the Dis-rict Court such action is warranted,** in order that claim nay be considered and passed upon as a claim against the ebtor's estate in bankruptcy.

So ordered.

In the Supreme Court of the United States

OCTOBER TERM, 1948

COCHINOYE-MEXICAN COAST CORPORATION, COCHINOYE COMPANY, INC., COCHINOYE-MEXICAN COAST CORP., BANK OF PENNSYLVANIA, AND [illegible] COMPANY, PETITIONERS

v.

MAURICE [illegible]
EXCHANGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT [illegible]

BRIEF FOR [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 358

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, AND LENOX COAL COMPANY, PETITIONERS

v.

MAURICE P. ANGLAND AND SECURITIES AND EXCHANGE COMMISSION, INTERVENER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 24–28), as amended (R. 34), is reported at 136 F. (2d) 3. The opinion of the district court (R. 1–5) is unreported.

JURISDICTION

The decree of the circuit court of appeals was entered May 24, 1943 (R. 29); rehearing was

denied June 17, 1943 (R. 34); and leave to file a second petition for rehearing was denied June 29, 1943 (R. 36). The petition for a writ of certiorari was filed September 15, 1943. The jurisdiction of this Court is invoked under Section 24 (c) of the Bankruptcy Act, as amended (11 U. S. C. § 47 (c)), and Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

The sole question presented is whether, after the confirmation of a plan of reorganization under Chapter X of the Bankruptcy Act, the circuit court of appeals erred in remanding the cause to the district court in order that it might determine whether it should reopen the proceedings to consider a creditor's claim.

STATUTE INVOLVED

The pertinent statutory provisions are set out in the Appendix, *infra*, pp. 8–9.

STATEMENT

Maurice P. Angland filed two applications requesting allowances of compensation for services in the reorganization proceedings of the petitioners under the Bankruptcy Act.[1] The first appli-

[1] The proceedings were instituted under Section 77B (11 U. S. C. § 207), but they were subsequently made subject to the provisions of Chapter X. The Commission has participated in the courts below and is a party here pursuant to Section 208 of that chapter (11 U. S. C. § 608).

cation covers services performed by Angland as a member of a bondholders' committee (Doc. No. 131). The other covers services performed by Angland prior to the reorganization proceedings as agent or trustee of the debtor in salvaging properties of an Illinois subsidiary which was then in bankruptcy (Doc. No. 130).

The district court disallowed both applications because of the disqualifications imposed by Section 249 of Chapter X (11 U. S. C. § 649) on fiduciaries who have traded in the debtor's securities. The circuit court of appeals affirmed with respect to the first application, and no question as to that application is presented here. As to the second, the circuit court of appeals held that the claim for services in salvaging the debtor's property prior to bankruptcy was not a reorganization claim conclusively barred by Section 249, but was a creditor's claim which might or might not be barred by general equitable principles. The court reversed and remanded for the purpose of permitting Angland to apply to the district court for "a reopening of the proceeding" (R. 28),[2] in the district court's discretion, in order that the claim involved in his second application might be passed upon as a claim against the debtor's estate.

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[2] Actually no final decree closing the estate has yet been entered by the district court under Section 228 (11 U. S. C. § 628), but it is assumed in this brief that Angland's application will be treated for practical purposes as one to reopen the proceedings.

The debtor's petition for a writ of certiorari does not question the correctness of the court's holding that the claim for services in salvaging the debtor's Illinois subsidiary was properly a creditor's claim rather than a reorganization claim. The debtor argues simply that the court below erred in holding that the district court had jurisdiction to reopen the proceedings for the purpose of determining the claim as a creditor's claim after the confirmation of a plan of reorganization.

ARGUMENT

The petition for a writ of certiorari should be denied because (1) the order sought to be reviewed is not a final order and (2) the decision below involves neither a conflict of decisions nor a question of sufficient public importance to warrant review by this Court.

(1) The order remanding the cause to the district court for further proceedings is not a final order. *Union Mutual Life Insurance Co.* v. *Kirchoff,* 160 U. S. 374. Since the granting or denial of an application to reopen the proceedings will be addressed to the sound discretion of the district court,[3] it is entirely possible that the

[3] *In re Leigh*, 272 Fed. 678 (C. C. A. 7), certiorari denied *sub nom. Chicago Railway Equipment Co.* v. *Laughlin*, 256 U. S. 698; *In re Schreiber*, 23 F. (2d) 428 (C. C. A. 2), certiorari denied *sub nom. Schreiber* v. *Public National Bank & Trust Company of New York*, 277 U. S. 593; *In re Butts*, 123 F. (2d) 250 (C. C. A. 2). The circuit court of appeals here made this quite clear in its opinion, particularly as amended (R. 28, 34).

court in the exercise of its discretion will refuse to reopen at this late stage. See, *e. g., Mohonk Realty Corp.* v. *Wise Shoe Stores, Inc.,* 111 F. (2d) 287 (C. C. A. 2), certiorari denied, 311 U. S. 654; cf. *Burton Coal Co.* v. *Franklin Coal Co.,* 67 F. (2d) 796 (C. C. A. 8) (ordinary bankruptcy). It is possible also that the court will in its discretion reopen the proceedings, but disallow Angland's claim as a creditor because of a breach of his fiduciary obligations apart from Section 249 of the Bankruptcy Act. See, *e. g., In re Paramount-Publix Corp.,* 12 F. Supp. 823, 831 (S. D. N. Y.); *In re Republic Gas Corp.,* 35 F. Supp. 300 (S. D. N. Y.); *In re Mountain States Power Co.,* 118 F. (2d) 405, 408 (C. C. A. 3); cf. *American United Mutual Life Insurance Co.* v. *Avon Park,* 311 U. S. 138, 146–47 (Chapter IX); *Woods* v. *City National Bank & Trust Company of Chicago,* 312 U. S. 262; *Pepper* v. *Litton,* 308 U. S. 295, 306. In other words, the order remanding the proceedings is not a final order which in any sense adjudicates Angland's right either to have the proceedings reopened, or to have his claim allowed.[4] This alone is sufficient ground, in the Court's discretion, for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 257–258.

[4] If the order below stands, the Commission may take the position in the district court that under all the circumstances the proceedings should not be reopened, or that Angland's claim should be disallowed; or it may make both these arguments.

(2) The petition presents no question of public importance and there is no conflict of decisions. Section 2a (8) of the Bankruptcy Act (11 U. S. C. § 11a (8)) specifically gives the court power to "reopen estates for cause shown."[5] Under this provision, as well as its general equity powers, the reorganization court has jurisdiction to reopen the proceedings, even after confirmation of a plan and after the expiration of the time for appeal, in order to permit the filing of a claim which was not filed within the time originally set by reason of mistake or fraud or other good cause. Cf. *Mohonk Realty Corp.* v. *Wise Shoe Stores, Inc.*, 111 F. (2d) 287 (C. C. A. 2), certiorari denied, 311 U. S. 654; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 136–137; *Zeleznik* v. *Grand Riviera Theater Co.*, 128 F. (2d) 533, 537 (C. C. A. 6).[6] An order reopening the proceedings may be reviewed for abuse of discretion. *Standard Steel Works* v. *American Pipe & Steel Corp.*, 111 F. (2d) 1000 (C. C. A. 9). But there is no question of the court's jurisdiction.

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[5] By virtue of Section 102 (11 U. S. C. § 502) this provision applies in proceedings under Chapter X because it is not inconsistent or in conflict with the provisions of that chapter.

[6] Cf. also *Pepper* v. *Litton*, 308 U. S. 295, 305, n. 11, where this Court said with respect to the analogous problem whether a claim may be proved in ordinary bankruptcy proceedings after the six-month period specified in Section 57n (11 U. S. C. § 93n): "* * * even though the act provides that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
ALVIN J. ROCKWELL,
Attorney.

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OCTOBER 1943.

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claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the bankruptcy court in the exercise of its equitable jurisdiction has power to permit claims to be proved thereafter in order to prevent a fraud or an injustice."

APPENDIX

The Bankruptcy Act provides in pertinent part:

Section 2a, 11 U. S. C. § 11a

The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * * * *

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown.

Section 208, 11 U. S. C. § 608

The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding

with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding.

Section 249, 11 U. S. C. § 649

Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 358.

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, and LENOX COAL COMPANY,

Petitioners,

vs.

MAURICE P. ANGLAND,

Respondent.

RESPONDENT'S BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI.

McDevitt, Philips and Watters,
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CASES CITED IN BRIEF.

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RESPONDENT'S BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI.

COUNTER-STATEMENT OF FACTS.

Subject to the following exceptions, the statement of facts contained in the petition is correct:

(a) On page 2, line 13, it is incorrect to state "respondent as a member of the committee entered into an agreement". The record does not show that his agreement had anything to do with his membership on a Bondholders' Committee. On the contrary, the debtor corporation employed him individually to undertake certain salvage work, as stated in the second paragraph of the opinion of the Circuit Court of Appeals, to which finding no exception has been taken.

(b) On page 3, line 11, the petitioner correctly states that the District Court fixed November 1, 1937 as a date before which creditors' claims should be filed. However, petitioner neglects to state that this date was extended from time to time to May 29, 1942, (No. 108). By the same decree, in paragraph 11, the Court reserved jurisdiction "to make from time to time such further orders as to it shall be deemed proper, amplifying, extending, limiting, or otherwise modifying this order".

(c) It is misleading to state on page 5, line 12, of the petition that "no appeal was taken from said order". Respondent took a timely appeal from the District Court's action in disallowing his claim. That appeal resulted in the reversal which is the subject matter of this petition. Said appeal may not have been worded in the exact lan-

guage of Section 222 of the Bankruptcy Act, but its import is clear.

In addition to the facts stated in the petition, respondent believes the following facts are pertinent:

(a) In the District Court proceedings, petitioner raised no question of any alleged delay by respondent or of any procedural errors.

(b) The sum claimed by respondent, $3,500., is infinitesimal in comparison with the amount involved in the reorganization.

ARGUMENT.

The decision of the Circuit Court of Appeals was not of the type ordinarily reviewed by your Honorable Court for the following reasons:

I. THE ORDER OF THE CIRCUIT COURT OF APPEALS WAS INTERLOCUTORY.

That the order of the Circuit Court of Appeals is interlocutory is so patent as to require no discussion.

II. THERE ARE NO CONFLICTING DECISIONS IN OTHER CIRCUITS.

Every reported decision is in conformity with the order now questioned. All of them hold that discretion to modify a plan rests with the District Court as provided by Section 222 of the Bankruptcy Act.

III. PETITIONER'S OBJECTION IS TO FORM ONLY.

The only real complaint deducible from the petition and brief is that the claim filed by the respondent, Angland, (apparently informally prepared by respondent him-

self and prior to retention of present counsel) was inartistic in that it contained no prayer couched in the language of Section 222 of the Bankruptcy Act. The nature of respondent's demands was obvious. No objection to form was interposed in the District Court. Hence, the failure to artfully plead is hardly a ground for certiorari to the Circuit Court of Appeals which recognized the equities of the case and found that mere errors of form do not absolutely foreclose a litigant's equitable right to a hearing on the merits.

IV. PETITIONER'S OBJECTION SHOULD HAVE BEEN MADE IN THE DISTRICT COURT.

Respondent's claim for compensation for services in salvaging the Illinois properties was filed on June 15, 1942, or seventeen days after the permissive period which ended on May 29, 1942. However, this was two days before the deadline of June 17, 1942 fixed by the Court in its decree of June 6, 1942. It is not likely that the respondent knew the fine line of distinction between the type of claim which was to be filed by May 29, 1942, and the type that petitioner believes could be filed up until June 17, 1942. In any event, petitioner was represented by competent counsel who made no effort to have the District Court quash the claim on the ground of laches. All parties in interest, including the present petitioner, the Securities and Exchange Commission, and other creditors, treated the claim as having been filed in time and the District Court proceeded to take testimony without questioning the date when the petition was filed. Where delay was apparently waived by all parties, it has been held that the contention will not be considered by the Supreme Court. LYNCH vs. U. S., 292 U. S. 571, 587; 54 Supreme Ct. Reporter 840, 847.

V. THE ACTION OF THE CIRCUIT COURT OF APPEALS WAS IN CONFORMITY WITH THE ACT OF CONGRESS.

The order complained of does not finally decide that respondent will receive the amount of his claim, but merely directs proceedings in conformity with Section 222 of the Bankruptcy Act. That Section authorizes the District Court, in its discretion, to modify a plan of reorganization after confirmation.

> "Sec. 222.—A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with."

This unambiguous language of Congress was recognized by the Circuit Court of Appeals and was given effect, yet the present petitioner would have the Circuit Court of Appeals reversed.

VI. EVEN IF THERE WAS AN UNWAIVED PROCEDURAL DEFECT, SUCH DEFECT WAS HARMLESS.

Filing the claim seventeen days sooner, if that was requisite, would have aided no one. The same questions would be before the Court regardless of filing date. At the moment when the respondent's claim was filed, and throughout the time it was being considered by the District Court, no one could tell what cash sum would be paid to the creditors of the reorganized corporation or how much cash would be turned over to the reorganized corporation, inasmuch as the Court had under consideration claims of other creditors and the usual claims of counsel, committees, accountants, and trustees. Respondent's claim was considered simultaneously with these other claims so that any trivial delay in filing this claim did no harm to the ultimate plan of reorganization. It is not as though this claim had arisen after all others had been adjudicated. The real delay arises from the commission by the District Court of reversible error, and not from any omission by the respondent.

Furthermore Congress, the final arbiter of policy, provided in Section 222, that in equitable cases appealing to the discretion of the District Court, a plan might be modified even after its confirmation. Hence the action of the Circuit Court of Appeals attained an equitable result, complied with the intent of Congress, and preserved to the debtor the full right and privilege of raising all manner of objections in the District Court.

VII. THE ARGUMENTS IN PETITIONER'S BRIEF ARE WITHOUT MERIT.

The petitioner's brief, at page 9, line 6, erroneously states that the respondent "filed no claim as a creditor". Whether or not respondent's claim was artistically drafted, no one could doubt that he was claiming to be compen-

sated for services rendered the debtor corporation before it filed its petition under Section 77B.

On page 10 of the petitioner's brief, it lists seven alleged errors of the Circuit Court of Appeals. Replies to these allegations will be presented seriatim:

1. The bar order of November 1, 1937 was, by its own terms, subject to amendment "on order for cause shown", and was actually extended to May 29, 1942 and thereafter there was an extension to June 17, 1942, the language of which may or may not be broad enough to include the respondent's claim. That is one of the matters that may properly be argued in the District Court under the decision of the Circuit Court of Appeals.

2. To say that the District Court's order of June 6, 1942 directing distribution prevented any further action by this respondent, would be to say that a District Court, by the use of apt language, can thereby block any appeal from its decrees. The proposition answers itself.

3. and 4. Any effort by the District Court to bar creditors' claims is always subject to a petition under Section 222 of the Bankruptcy Act, even after a plan has been confirmed.

If the District Court could terminate all litigation by decreeing that it has "divested itself of all jurisdiction", there would be no excuse for the existence of Appellate Courts.

5. This argument has heretofore been answered. The respondent's objectives contained in his claim filed June 15, 1942 were apparent to everyone, so that the petitioner's real complaint deals with form, not substance.

6. and 7. Section 222 does not set any time limit on the efforts of creditors to obtain what they consider to be justice, but leaves it to the discretion of the District Court,

which is exactly what is accomplished by the decree of the Circuit Court of Appeals in the instant case.

Later on page 10, the petitioner states that the allowance of respondent's claim would materially affect the rights of other creditors. A comparison of the amount of the respondent's claim with the amount of assets available for creditors indicates that an allowance of his claim in full would not materially affect the rights of other creditors. Its effect would be infinitesimal. However, in any reorganization, the precise amount payable to other creditors must necessarily remain indefinite so long as any claims are pending on appeal as in the instant case.

VIII. CONCLUSION.

For the above seven reasons, the complaint concerning the interlocutory decree is trivial throughout, if not frivolous, and is not such as to warrant granting the prayer of the petition and it should therefore be denied.

Respectfully submitted,

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(19)

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Supreme Court of the United States

October Term, 1943.

No. 358.

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, and LENOX COAL COMPANY,

Petitioners,

v.

MAURICE P. ANGLAND,

Respondent.

Petitioners' Reply Brief in Support of Petition for Writ of Certiorari

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IN THE

Supreme Court of the United States.

No. 358. October Term, 1943.

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA AND LENOX COAL COMPANY,

Petitioners,

v.

MAURICE P. ANGLAND,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The briefs of both the respondent and the Solicitor General of the United States urge that the petition for writ of certiorari filed herein should be denied for the reasons that:

(1) The order remanding the cause to the District Court for further proceedings is not a final order; and

(2) There is no conflict of decisions.

Even if their position were correct, the mere statement of these reasons makes it apparent that they have missed the ground for filing the petition, namely, that the Circuit Court of Appeals for the Third Circuit is by its mandate attempting to direct the District Court for the District of Delaware to exercise a jurisdiction which it does not now have.

In the case of *Indianapolis v. Chase National Bank*, 314 U. S. 63 (1941), Mr. Justice Frankfurter, speaking for this Court, at page 75, stated:

> "And, of course, this Court, by its denial of certiorari when the case was here the first time, could not confer the jurisdiction which Congress has denied."

In our petition we pointed to paragraph (1) of Section 224 of Chapter X of the Bankruptcy Act, as amended (11 U. S. C. A. § 624), which provides that:

> "Upon confirmation of a plan—
>
> "(1) The plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed, or are allowable; * * *"

We further pointed out that the court had adopted this language in its order confirming the plan dated June 6, 1942, and had, in further compliance with that section and with the provisions of the law, directed the debtors and the reorganized company to carry out the plan of reorganization and to make distribution in accordance with the provisions of the plan. We also directed the court's attention to the fact that no appeal had been taken from that order and that the time for such appeal had expired. Consequently, under the law and in the absence of a showing of fraud or injustice, the District Court is without jurisdiction to modify the plan at the suit of a creditor; and the

Circuit Court of Appeals is likewise without jurisdiction to command the court to take such action.

This Court, both in its decisions and rules, has recognized the necessity of confining its inferior courts within the limits of their jurisdiction. Rule 38, paragraph 5, setting forth the character of reasons for a review on writ of certiorari, provides among others, the following:

> "(b) Where a circuit court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Mr. Chief Justice Fuller, speaking for this Court in *In re Chetwood*, 165 U. S. 443, 461 (1897), stated:

> "By section 14 of the Judiciary Act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law'; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co. v. Jacksonville Railway,* 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. *398; Bac. Ab., Certiorari."

As stated in our main brief, petitioners should not be compelled to submit to a proceeding over which the court has no jurisdiction, with the consequent delay and expense and the undoubted necessity of a further appeal to the Circuit Court of Appeals, and perhaps to this Court, particularly when the answer to the question posed by the Circuit Court of Appeals is clear on the face of the record, namely, that the allowance of a creditor's claim at this late date would dilute the assets awarded to diligent creditors, thus materially and adversely affecting their interests and requiring a reopening of the plan and a resolicitation of acceptances thereof.

The respondent and the Solicitor General both contend that there are no decisions in conflict with the decision of the court below. This is by no means clear. Judge Frank, speaking for the Circuit Court of Appeals for the Second Circuit, in *In re Paragon Novelty Bag Co., Inc. City of New York v. Jersawit,* 135 Fed. (2d) 210 (1943), referring to Section 57, sub. n, of the Bankruptcy Act, as amended (11 U. S. C. A. § 93, sub. n), said:

> "The statement in the note in Pepper v. Litton, 308 U. S. 295, 304, 305, 60 S. Ct. 238, 244, 84 L. Ed. 281, to the effect that the bankruptcy court 'in the exercise of its equitable jurisdiction has power to permit claims to be proved' after the six months 'in order to prevent a fraud or an injustice' has no application here; that comment related to the statute before the 1938 amendment; moreover, here there was no showing that to allow the tardy filing of the claim was necessary 'in order to prevent a fraud or an injustice.' Appellant refers to the provision in § 57, sub. n, as amended, reading, 'When in any case all claims which have been duly allowed have been paid in full, claims

not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.' Appellant argues that this provision means that any failure to file a claim within the six-months' period must be excused if any of the assets have not yet been distributed among the creditors who filed their claims within the period. Of course, that is not true. The provision means merely that any surplus, which remains after all claims properly filed have been paid in full, shall be applied to claims tardily filed and shall not be for the benefit of the bankrupt."

Although he was there referring to a bankruptcy case, the principle is equally applicable here, that a tardy creditor can only be let in to the extent that there is a surplus available to the bankrupt or the owner of the business; and the record shows in this case that there was no surplus available to stockholders.

Likewise, in the case of *Mohonk Realty Corporation v. Wise Shoe Stores, Inc.*, 111 F. (2d) 287 (1940), the same court said:

> "A reorganization plan consummated under Chapter X is binding even as against creditors who were never scheduled and never knew of the proceedings."

Section 222 of the Bankruptcy Act, as amended (11 U. S. C. A. § 622), must necessarily be read in connection with Section 224 which follows it and must be interpreted as meaning that the court cannot exercise its discretion to reopen a plan of reorganization which has been confirmed unless there is a showing of fraud or injustice.

The respondent presents additional grounds for the denial of the petition for a writ of certiorari which petitioners believe to be immaterial and unworthy of reply. Perhaps one statement demands clarification: The time fixed for filing claims, namely, November 1, 1937, was extended by the order of the court approving the plan dated April 17, 1942 (No. 108) to May 29, 1942, the time fixed for filing acceptances of the plan; the further date of June 17, 1942, referred to by respondent, was the time fixed in the order of the court confirming the plan dated June 6, 1942 (No. 117), within which application for allowances might be made, the court expressly reserving jurisdiction in its order to make these allowances. Respondent filed his claim for such an allowance, and the following appears in his direct testimony in support of said claim:

> "Q. Was it your understanding that all of this work was done with a view to reorganize the Cosgrove-Meehan Coal Corporation?
>
> A. Very definitely. That was the only possible purpose." (No. 138 p. 55)

Reference to this fact is made here for the sole purpose of showing that there was no misunderstanding of the form or nature of respondent's claim in the District Court, as alleged by respondent in his brief. The record will show, despite the finding of the Circuit Court of Appeals, that he has never made a claim as a creditor in the District Court; and the opinion of the Circuit Court of Appeals as to the nature of his claim is clear error. However, that issue is not raised in the petition filed with this Court.

In conclusion, petitioners urge that their petition, confined solely to the jurisdictional question raised therein, should be granted.

Respectfully submitted,

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